A

MEASAT BROADCAST NETWORK SYSTEMS SDN BHD

v.

AV ASIA SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[ORIGINATING SUMMONS NO: 24NCC(ARB)-35-11-2013]
20 JANUARY 2014

C

CIVIL PROCEDURE: *Security - Security for plaintiff's costs - Interim measure in pending arbitration proceedings - Jurisdiction - Whether High Court had power to grant remedy - Whether application for security flawed - Whether defendant in financial position to pay plaintiff's costs -*

D

Whether there was real possibility that plaintiff would be deprived of any order of costs made in its favour - Whether application ought to be granted - Quantum - Assessment of

E

The plaintiff and defendant had entered into a mutual non-disclosure agreement ('MNDA'), which contained an arbitration clause. A dispute subsequently arose between the parties as to whether the plaintiff had breached the MNDA by divulging confidential information obtained by it from the defendant to third parties. The defendant chose not to refer this dispute to

F

arbitration. Instead, it initiated a civil suit against the plaintiff. The plaintiff applied for a stay of the court proceedings pending arbitration. As the defendant made no attempt to commence arbitration proceedings in respect of the alleged breach of the MNDA, the plaintiff felt constrained to commence such arbitration

G

proceedings seeking to establish that it was not in breach of the MNDA. This was the plaintiff's application for security for costs in the sum of RM4,014,000, as an interim measure in pending arbitration proceedings. The plaintiff canvassed its application for security on the grounds that there was credible evidence to show

H

that the defendant was not in a position to pay the plaintiff's costs of the arbitration in the event that the defendant was unsuccessful in its counterclaim. In support of its contention, the plaintiff relied upon evidence of (i) the defendant's failure to file its annual returns with the Companies Commission of Malaysia since 2002; (ii) the apparent insolvency of the defendant; (iii) the

I

conduct of the defendant in failing or neglecting to pay the order for security for costs in respect of other interim applications initiated by the plaintiff until the issuance of notices of winding up

proceedings; and (iv) the defendant's reliance on third party funding. The defendant opposed the application for security for costs and further submitted that the quantum sought was oppressive, excessively exorbitant and made in bad faith. The defendant also challenged the plaintiff's entitlement to seek security for costs.

Held (allowing plaintiff security for costs of RM1,191,000):

(1) The arbitration in the present case was a local arbitration that involved local parties who had contracted under the Malaysian law and had consented to the arbitral process being conducted under the auspices of the KLRCA and its arbitration rules. As such, the grant of security for costs was not governed by any policy considerations that could have arisen in international arbitrations. Further, this application for security for costs was made by the plaintiff in respect of the counterclaim that had been brought against it by the defendant. The application was therefore not flawed as suggested by the defendant. (paras 21, 44, 49 & 50)

(2) The plaintiff filed the present application because the parties could not reach a consensus for the arbitral tribunal to determine this issue of security for costs. The jurisdiction for this court to grant the interim relief of security for costs is expressly provided for in s. 11 of the Arbitration Act 2005 ('the Act'). Such adjudication is not contrary to but in fact amenable to the arbitration process because it serves to assist rather than derogate from the arbitral process. Hence, the power of this court to grant this remedy is derived from the Rules of Court 2012 and the Companies Act 1965. (paras 47-49)

(3) After taking into consideration cumulatively the various relevant factors and supporting evidence raised by the plaintiff and upon weighing and balancing the factors it was clear that this was a case which justified the grant of an order for security for costs of the arbitration. The failure of the defendant to file its annual returns for a total of not less than ten years seemed to suggest that its financial status was dubious at best. This evidence was taken together with other relevant factors such as the conduct of the defendant in failing or neglecting to pay the order for security for costs in respect of other interim applications initiated by the plaintiff

A until the issuance of notices of winding up proceedings and the undisputed evidence of financing by a third party. In the circumstances of this case, the plaintiff would be deprived of the effect of any order of costs being made in its favour against the defendant and thus the application for security for
B costs ought to be granted. (paras 63, 65, 67, 68 & 69)

(4) Under s. 11 of the Act, the court is not required to award security in the sum equal to the anticipated costs. In the present case, one of the relevant factors to be taken into
C consideration in assessing the quantum of the security for costs was the skeleton bill of costs. Upon a reasonable assessment of the skeleton bill of costs and trying to estimate the sort of costs that could be incurred should the arbitration run its full course, the security for costs to be awarded to the
D plaintiff ought to be in the region of RM1,191,000. The security was also ordered to be paid into court within three months of the date of this order, failing which the defendant's counterclaim in the arbitration was to be stayed. (paras 77-79)

Case(s) referred to:

E *Coppée-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd (in liq); Voest-Alpine AG v. Ken-Ren Chemicals and Fertilizers Ltd (in liq) [1994] 2 All ER 449* ***(dist)***

Re Unisoft Group Ltd (No 2) [1993] BCLC 532 ***(refd)***

Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ
F *432 CA* ***(refd)***

Wan Muhamad Ibrisam Wan Ibrahim & Ors v. Opal Pyramid Sdn Bhd [2009] 1 CLJ 201 CA ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 10, 11(1)(a), 19(2)
G Companies Act 1965, s. 726
Rules of Court 2012, O. 23

Companies Act 1985 [UK], s. 351(1)
English Companies Act 1948 [UK], s. 447

H *For the plaintiff - Cecil Abraham (Wong, Wye Wah & Idza Hajar with him); M/s Navaratnam Chambers*

For the defendant - Malik Imtiaz (Chan Wei Jun & Clinton Tan with him); M/s Thomas Philip

I *Reported by Vani Krishnan*

JUDGMENT

Nallini Pathmanathan J:

Introduction

[1] By this originating summons the plaintiff, Measat Broadcast Network Systems Sdn Bhd ('Measat'), applies for an order of security for costs, against the defendant, AV Asia Sdn Bhd ('AV Asia') in respect of the counterclaim brought by AV Asia against it, in pending arbitration proceedings. The arbitration proceedings which were commenced between the parties on 23 October 2012, is a domestic arbitration conducted under the auspices of the Kuala Lumpur Regional Centre for Arbitration ('KLRCA').

[2] The application for this interim measure is made under s. 11(1)(a) of the Arbitration Act 2005. The precise order sought is one requiring AV Asia to pay into court, by way of security for costs, the sum of RM4,014,000 or such sum as the court deems proper. In the event such security as is ordered is not paid, Measat seeks a further order that AV Asia's counter claim stands dismissed without further order and that costs be borne by it.

[3] AV Asia opposes this application for security strenuously, maintaining that there is insufficient basis for the grant of such an order, and more significantly, that the order sought seeks in reality, to stifle, oppress or suppress the genuine and *bona fide* counter claim it seeks to have adjudicated in these arbitration proceedings.

Factual Background

[4] The salient background facts which I set out below are adopted from, *inter alia*, the written submissions and affidavits filed by the parties.

[5] Measat is the operator of the Malaysian 'direct broadcast satellite pay TV service' known as Astro. The satellite television services provided by Astro were susceptible to service disruption during instances of rain in Malaysia, a phenomenon described in the industry as the 'rain fade problem'. AV Asia and a Japanese company known as Maspro Kenkoh Corporation ('Maspro'), who conduct business in the satellite broadcasting industry, approached Measat with a view to providing a solution to this 'rain fade problem'.

[6] This approach culminated in AV Asia and Measat signing a mutual non-disclosure agreement dated 1 August 2008 ('MNDA').

[7] Clause 21 of the MNDA contains an arbitration clause in the following terms:

> This NDA shall be governed by the laws of Malaysia and all disputes arising out of this NDA shall be resolved by arbitration at the Kuala Lumpur Regional Centre for Arbitration in accordance with the Rules of Arbitration of the Regional Centre for Arbitration Kuala Lumpur.

[8] A dispute subsequently arose between the parties. AV Asia describes it thus:

> Accordingly, AV Asia and Maspro conducted research and development to provide a solution to significantly mitigate the rain fade problem. Pursuant to the MNDA, AV Asia had disclosed confidential information to MEASAT.
>
> It is AV Asia's counter claim that, in breach of the MNDA and the common law principle of breach of confidential communication, MEASAT had wrongfully disclosed the confidential information obtained by it from AV Asia, to third parties.

[9] Notwithstanding the existence of this arbitration clause in the MNDA, AV Asia chose not to refer the dispute that arose between it and MEASAT to arbitration. Instead, AV Asia initiated a civil suit in the Kuala Lumpur High Court *vide* Civil Suit No: D-22IP-64/2010 against Measat and another company. In this civil suit, AV Asia alleged that Measat had utilised and/or divulged confidential information belonging to it, in breach of the MNDA. AV Asia sought, *inter alia*, injunctive relief in respect of the alleged use of the confidential information, damages in the region of RM1.7 billion and exemplary or aggravated damages.

[10] Measat, in response, applied for a stay of these court proceedings pending arbitration pursuant to s. 10 of the Arbitration Act 2005. This was because the dispute between the parties clearly fell within the scope and ambit of the arbitration clause. The application for a stay was allowed on 10 December 2010. The decision of the High Court was affirmed on appeal by both the Court of Appeal and the Federal Court.

[11] Shortly after the grant of the stay by the High Court, AV Asia sought an application for an injunction in aid of arbitration pursuant to s. 11 of the Arbitration Act 2005. *Vide* this application in Originating Summons No: D-24NCC(ARB)-17-2010, AV Asia sought to restrain Measat from making use of and/or divulging any of the confidential information comprising the subject matter of the MNDA. This application was dismissed by the High Court on 27 May 2011. Its decision was affirmed by the Court of Appeal and the Federal Court.

[12] Despite the grant of the stay under s. 10 and the s. 11 injunction application made by AV Asia, AV Asia made no attempt to commence arbitration proceedings in accordance with cl. 21 of the MNDA. This appears unusual as it was in fact AV Asia that complained of having been wronged and injured materially, by an alleged breach of the MNDA. In these circumstances Measat felt constrained to, and did commence arbitration proceedings by way of a notice of arbitration dated 23 October 2012.

[13] The arbitration proceedings are presently afoot and the parties are in the midst of exchanging pleadings.

The Law

[14] As stated at the outset, s. 11 provides for the High Court to make orders for any interim measure including security for costs. The powers of the High Court to order security for costs are governed by O. 23 of the Rules of Court 2012, and s. 351(1) of the Companies Act 1965. The latter section is relevant in the instant case as AV Asia is a company.

[15] Section 351(1) of the Companies Act 1965 provides that where a company is plaintiff in an action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if he is not successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given.

[16] The Court of Appeal in *Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals* [1998] 3 CLJ 432; [1998] 4 AMR 3298; [1998] 3 MLJ 69 formulated the test to be applied in determining whether an order for security for costs ought to be made. Having set out the provisions of s. 351(1) of the Companies Act 1965, the court went on to hold as follows:

A As may be seen; and this is borne out by the authorities decided upon the parallel provisions in other common law jurisdictions; the section provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step is for the court hearing an application in this regard B to determine whether there is credible evidence. The second step is to ascertain whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant.

C **[17]** The court went on to consider the correct approach to an application of this nature:

... In our judgment, the correct approach to an application of the nature that forms the subject matter of the appeals before us is that stated by Lord Denning MR in *Sir Lindsay Parkinson & Co* D *Ltd v. Triplan Ltd* [1973] QB 609 where, at p. 626, the Master of the Rolls said:

I do not think those observations are correct. I prefer to follow the cases which are to be found in the notes in 76 LJ 204 [*Ebury Garages Ltd v. Agard*] and 77 LJ 123 [*Gill All Wether Bodies Ltd.* E *v. All Weather Motor Bodies [Ltd*]. Scrutton LJ said that there were too many applications against companies for security for costs. In his view 'the powers of the section should be carefully used'. Maugham LJ said:

> F The section only confers discretion on the court. There may be many cases where a company is insolvent, and yet the court would not order security to be lodged.

I would add a case in 1962 in the Supreme Court of Eire. It is *Peppard and Co Ltd. v. Bogoff* [1962] IR 80. Kingsmill Moore J G said, at p. 188:

> ... the section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the court which may H be exercised in special circumstances.

Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case. I

[18] The Court of Appeal approved and reaffirmed this approach in *Wan Muhamad Ibrisam Wan Ibrahim & Ors v. Opal Pyramid Sdn Bhd* [2009] 1 CLJ 201; [2008] 6 MLJ 728. Having considered the position under British law (in s. 447 of the English Companies Act 1948 which is *pari materia* with our s. 351 of the Companies Act 1965) the court went on to rely on *Sir Lindsay Parkinson & Co v. Triplan Ltd.* (*supra*) and concluded as follows:

> Bottom line, by virtue of s. 351, the court here statutorily may entertain the application if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence. Nothing is mentioned of the weaknesses of the plaintiff's case. The application of discretion if security for costs is to be granted, therefore is subject to credible testimony, i.e. the source of the reason that the plaintiff will be unable to pay the costs of a successful defendant (*Skrine & Co v. MBf Capital Bhd & Anor* [1998] 3 MLJ 649).
>
> It is quite clear from all the above authorities that the concept of likelihood of winning has no place at all in an application for security for costs before a judge. The prerequisite is that there is credible testimony before the judge and that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendants if they are successful in their defence. The discretion ought not to be hampered by any new formulated concepts that tend to import inhibitive demands into s. 351 of the Companies Act 1965.

[19] It is therefore clear from the foregoing cases that the test to be applied by this court is to ascertain whether there is credible testimony before this court giving rise to the belief that AV Asia will be unable to pay Measat's costs if Measat is successful in its defence of the counter claim. The likelihood of success or weakness of AV Asia's counter claim is not a relevant consideration to be taken into account in the exercise of discretion by this court.

[20] At this juncture it is necessary to consider an issue raised by learned counsel for AV Asia. He points out that in the instant arbitration proceedings it is in fact Measat that is the plaintiff and that AV Asia is the defendant. In these circumstances the entitlement of Measat to seek security for costs as plaintiff against the defendant, AV Asia, is challenged. However this issue is readily

A answered as the factual matrix of this case discloses that it was in fact AV Asia, as the aggrieved party, that failed or refused to initiate arbitration proceedings in the face of a dispute. In other words the real 'plaintiff' as it were in these proceedings is AV Asia, which alleges a breach of the MNDA. However it is equally clear
B from the compendium of legal proceedings that have ensued since 2010, that Measat was constrained to initiate arbitration proceedings in view of AV Asia's consistent refusal to do so, notwithstanding the grant of a stay under s. 10 and its own application for interim relief under s. 11. Measat was forced to
C adopt the position of 'plaintiff' in order to bring the dispute to arbitration as is borne out by the relief sought by it, namely that it is not in breach of the MNDA. In other words it seeks to establish the negative, rather than AV Asia establishing a breach.

D **[21]** Further and more significantly, this application for security for costs is made by Measat in respect of the counter claim brought by AV Asia. Therefore Measat in the counter claim is the 'defendant' and seeks security for costs against the 'plaintiff' in the counter claim ie, AV Asia. The application is therefore not flawed
E as is sought to be suggested by AV Asia.

[22] Another useful decision on the test to be applied by the court in an application such as the present is as enunciated by Sir Donald Nicholls V-C in the English case of *Re Unisoft Group Ltd (No 2)* [1993] BCLC 532. The relevant section under
F consideration in that case, namely s. 726 of the Companies Act 1985 is substantially similar to s. 351 of the Companies Act 1965. The dispute between the parties related to the proper interpretation of the English s. 726 and in particular the effect of the words 'if
G it appears by credible testimony that there is reason to believe.' The learned judge held as follows:

> I start consideration of the subsection by noting that the phrase 'the company will be unable to pay the defendant's costs if successful in his defence', is clear and unequivocal. The phrase is
H 'will be unable', not 'may be unable'. 'Inability to pay' in this context I take to mean inability to pay the costs as and when they fall due for payment. Thus the question is, will the company be able to meet the costs order at the time when the order is made and requires to be met? That is a question to be judged and answered as matters stand when the application is heard by
I

> the court, although the court will take into account and give appropriate weight to evidence about what is expected to happen in the interval before the costs order would fall to be met. The court will draw appropriate inferences and here, as elsewhere, it will not let common sense fly out of the window.
>
> The phrase 'the company will be unable to pay' is preceded by the words 'if it appears by credible testimony that there is reason to believe'. I do not think this latter phrase has the effect of watering down the words which follow. The Court, on the basis of credible testimony must have 'reason to believe', that is, to accept 'that the company will be unable to pay'. If this were not so, and the test is not whether the court, on the basis of credible testimony, believes the company will be unable to pay, then it is difficult to identify what is the proper approach and what is the test being prescribed by the statute. It cannot, surely, suffice that the applicant's accountant, for example, who is a credible witness, puts forward a case of inability to pay. If there is conflicting evidence the court must have regard to that also. The court must reach a conclusion on the basis of the totality of the evidence placed before it, giving such weight to the various matters deposed to as is appropriate in the circumstances. The matter on which, in the end, the court is required to reach a conclusion is whether the company will be unable to pay.

[23] This case assists in setting out the role attributed to the court namely to establish whether there is credible testimony, and if so whether such testimony leads to the inference or conclusion that the subject company will be unable to pay the defendant's costs if it is successful. In relation to the present case, it means that it has to be ascertained whether there is credible testimony put forward by the applicant, Measat, and if so whether such testimony leads to the inference that AV Asia will be unable to pay Measat's costs if Measat is successful in its defence to the counter claim.

[24] Having specified that which the court has to ascertain, it next falls to be considered how the court is to exercise its jurisdiction in an application such as the present.

How Is The Discretion Accorded To A Judge In Respect Of An Application For Security For Costs To Be Exercised?

[25] This issue has been fully and comprehensively considered the same case, ie, in *Re Unisoft Group Ltd (No 2)* (*supra*). The learned judge set out the factors he considered relevant in exercising his discretion.

[26] Firstly, he considered the financial status of the petitioner in that case (the equivalent being AV Asia under the counter claim in the present arbitration proceedings) and concluded that it would be difficult for the company to provide security in the quantum sought.

[27] Secondly however, he held that notwithstanding the fact that the company could not meet such security, it did not follow that no order for security ought to be made. He pointed to the fact that behind the company are those who own or control it. They could put the company in funds if they wished the company to go ahead with the litigation on which it had embarked.

[28] Thirdly he estimated the sort of taxed costs that the respondents were likely to be awarded. This was considerably less than that sought under the application.

[29] Fourthly he considered that substantial costs had been incurred prior to the application for security.

[30] Fifthly and significantly it was pointed out that the jurisdiction conferred by the statute (as is the case here) does not require the court either to award security in a sum equal to the anticipated costs or to make no award at all. The learned judge held:

> It is not a case of either all or nothing. The discretion is wide enough to permit the court to award a sum in between these two extremes if justice and fairness so require. The court has power to order security in the full amount of the anticipated costs. The greater includes the less. The court may order a lesser sum.

[31] Sixthly the fact that there was an arguable case was considered, as well as the fact that the petition in question had been presented in good faith.

[32] Several other factors were considered including the fact that if no security were provided by the petition failed the respondents could well suffer irrecoverable loss. He held:

> ... As matters stand at the moment, they will find that the SHL cupboard is bare. In that circumstance fairness requires that those who own or control SHL should provide some security, so the costs risk of the litigation on which their limited liability company has embarked should not fall wholly on the respondents, who, on

this footing, would or might be wholly free from fault. As *Megarry V-C observed in Pearson v. Naydler* [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906, an impecunious company should not be permitted to use the threat that the defendants will have to whistle for their costs as a means of putting unfair pressure on more prosperous companies.

[33] The foregoing cases I have referred to all deal with situations where security for costs are sought in the midst of court proceedings. In *Coppèe-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd (in liq); Voest-Alpine AG v. Ken-Ren Chemicals and Fertilizers Ltd (in liq)* [1994] 2 All ER 449 ('the *Coppèe-Lavalin* case') the House of Lords had occasion to consider the issue of the grant of security for costs as an interim measure in pending arbitration proceedings.

[34] The brief facts of the case are that the appellant, who was seeking security for costs, was a Belgian company which entered into a contract with the respondent for the construction of a chemical plant in Kenya. The respondent was a Kenyan company and the Kenyan government a majority shareholder of the respondent. The contract contained an arbitration clause whereby disputes between the parties were to be referred to arbitration by the Court of Arbitration of the International Chamber of Commerce (ICC). Disputes arose and the matter was referred to arbitration. The parties were required to each pay half the amount fixed as the ICC's fees and costs. Although the respondent was by then in liquidation and insolvent, it paid its half of the requisite fees. The appellant however refused to pay its half-share of the deposit on the grounds of the respondent's insolvency and applied to the High Court for security for costs on the grounds that the respondent was ordinarily resident out of jurisdiction and that it was a nominal claimant, the real claimant being the Kenyan government. It also contended that the respondent would not be able to meet the appellant's costs in the arbitration if ordered to do so. At both the High Court and the Court of Appeal the appellant failed in its application for security for costs. In the House of Lords however, it succeeded by a majority with Lord Browne-Wilkinson and Lord Mustill dissenting.

[35] A primary concern in the courts below had been to ensure that under ICC rules, a local court should have regard to the fact that the arbitration was a consensual process and that the court

should strive to make the consensus effective by identifying the kind of arbitrate process that the parties either expressly or impliedly indicated that they were contemplating when they entered into the arbitration agreement. It was considered a relevant factor that an ICC arbitration indicated that the parties intended that the arbitration should as far as possible, be independent of the national legal system of the country in which the arbitration as to take place. There was also concern as to the degree to which any interim measures would encroach on the arbitrators' function.

[36] The House of Lords held that an international arbitration conducted in England under ICC rules did not preclude the court in the exercise of its powers and under the ICC rules from making an order for security for costs. However such an order should only be made in exceptional cases where the arbitration was such that an order for security for costs would support the arbitration, by preventing the arbitrator's power to award costs being nullified. In determining whether to exercise its discretion by ordering such security for costs in an ICC arbitration conducted in England, the court had to look at all the circumstances to see whether it was consistent with the nature of the arbitration agreement for an order for security for costs to be made. Mere lack of means of a party was not, in ordinary circumstances sufficient by itself to justify an order for security for costs since the parties were to be taken as having accepted the risks involved in the other party, while having the means necessary to enable him to take part in the arbitration, lacking the means, if he was unsuccessful, to meet his opponent's costs.

[37] On the facts of that case the House of Lords took into consideration as a salient factor, the insolvency of the respondent, but more importantly the fact that its claim was being funded by a third party, the Kenyan government. As such there was a real possibility that if the respondent were unsuccessful, the appellant would be left with an empty order if costs were awarded in its favour. On this basis the court determined that exceptionally, the court should make an order for security for costs.

[38] Lord Mustill dissented but delivered a decision where the legal reasoning set out the rationale of the majority. He differed only in respect of the application of that legal rationale to the facts

of the case, as I understand it. After comprehensively considering the leading cases on the award of security for costs in international arbitrations, Lord Mustill set out three broad grounds premised on which it was concluded that a national court could award security for costs without encroaching into the arbitration *per se*. I attempt below to set out the salient portions of Lord Mustill's reasoning, as it is relevant to the reasoning behind the award of security for costs in a pending arbitration as opposed to court proceedings. Lord Mustill held, *inter alia*, as follows:

> (i) ... For the reasons there given, I see nothing either express or implied in the rules to inhibit the court from deploying whatever national interim remedies may be necessary to suit the justice of the individual case. The nearest that the rules come to such a provision is art. 8(5) and this, as already suggested is there to facilitate the grant of interim measures, not to rule them out. Any other conclusion would have the most serious adverse consequences for the utility of ICC arbitration; for since the rules do not specifically mention security for costs any more than any other form of interim relief, if the argument is sound as regards security for costs it must be equally sound for the remainder. Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the court may be not only permissible but highly beneficial ...
>
> (ii) The second ground upon which it was urged that an order for security is objectionable in principle is that international conventions provide such effective means of ensuring that an award of costs is honoured that either the parties must be taken to have contracted on the basis that they would look to the conventions alone or the court, adopting a policy of minimum intervention, should not make any order in an arbitration which is not absolutely necessary. I see great practical problems with such an argument. The reasoning if sound does apply equally to all forms of international arbitration to which the conventions apply, including those characteristic of the maritime and commodity trades in which orders under s. 12(6)(a) have been made for many years without any hint that they might be objectionable in principle ... This would rule out the possibility of measures such as

A *saisie conservatoire*, which would surely be a retrograde step. As regards the suggestion that the parties have impliedly agreed to look to the conventions alone, I do not believe that the parties, if asked would have agreed to abandon any of the ways in which an award might be rendered fruitful; as to the other grounds argued there seems no reason why the court should abstain from adding a further means to ensure that a party in default does not escape from its obligations simply because an existing procedure may in the event serve the purpose.

C (iii) Lord Mustill also rejected the argument that security for costs is a remedy of English origin which should be excluded from the cosmopolitan world of institutional arbitration. He reasoned that the ICC rules acknowledge the propriety of an order for costs and it went too far to hold that the ancillary order for security ought to be rejected simply because the majority of nations do not employ it.

(iv) A further aspect to which Lord Mustill attached greater weight in relation to an order for security for costs was expressed thus:

> For present purposes interim measures may be arranged in three groups. The object of them all is to support the agreement to arbitrate, but their effects are not all the same. With the first group the national court lends its support by ordering purely procedural steps which the arbitrators either cannot order or cannot enforce; such as requiring an inspection of the subject matter immediately the dispute has arisen or compelling the attendance of an unwilling witness. The second group seeks to maintain the *status quo* pending the making of an award, so as to prevent one party from bringing about a change of circumstances adverse to the other which the arbitrators cannot adequately remedy. An interlocutory injunction is the most characteristic of these remedies. The third group consists of remedies designed to make sure that the award has the intended practical effect by causing one party to provide a fund to which recourse can be made by the other party if the first fails to honour an adverse award spontaneously. *Saisie conservatoire* and Mareva injunctions are typical of this kind of relief.

> My Lords, it is I believe clear the frame of mind in which a national court should approach the grant of such measures must be substantially influenced by the category into which they fall. In the case of the first group the court is concerned only to fill a gap which it can do without encroaching on the agreed procedure or the substantive decision-making powers of the arbitrators. With the third group an application for relief may call for some trespassing on the arbitrators' territory, since in some legal systems the court may be required to assess the apparent strength of the claim in order to decide whether it is just to make an order which interferes with the defendant's right to make free use of his funds. The second group potentially involves the greatest encroachment for at the lowers, the court will often find it necessary to consider whether a particular state of affairs which the arbitrators are being asked to create or declare ... is likely in the event to be created or declared by the award, in order to decide whether it is just to order holding relief in the shape of an injunction ...
>
> *It is in my judgment clear that the approach of the national court to the grant of interim relief should be conditioned to an important extent by the degree to which the particular remedy encroaches on the agreement that the arbitrators shall be the sole judges of the merits*. (emphasis mine).

[39] Having examined and explained the legal rationale behind the grant of such interim measures in an international arbitration setting, Lord Mustill considered the facts of the case. It was acknowledged that the appellant, *Coppèe-Lavalin* was being forced into a long and very expensive arbitration by an insolvent claimant whose backers while willing to pay mandatory deposits such as fees, gave no indication that they would prove equally ready to pay the appellant's costs if they lost and such costs were ordered against them. Lord Mustill however, in his final reasoning, dissented from the majority by concluding that the appellant, by agreeing to arbitrate, had taken on the risk of going into a private dispute resolution system with little remedy if the other party chose not to 'play fair'. The parties had chosen arbitration for better or for worse. Therefore he concluded that security for costs ought not to be awarded.

[40] However the majority disagreed with him on this final analysis. They expressed the clear view that on the facts of the case, particularly the indisputable evidence of third party financing, that this was a clear case which warranted the grant of security.

[41] Lord Slynn of Hadley put it thus:

> This is not a case in which all that is relied upon is the insolvency of the claimant as in Bank Mellat. There is the additional factor, which I regard as being critical, that the arbitration is being funded by a third party, namely, the state of Kenya. If the proceedings are successful as they could well be, the state, while it will not be the sole beneficiary will be a principal beneficiary and if there is an order for costs the money it has invested in the proceedings could well be reimbursed as a result of an order that the appellants pay costs. If the proceedings are unsuccessful the respondents will almost certainly have insufficient means to pay costs and the state, which has the means will have no responsibility for paying costs. This means that the appellants will be deprived in reality, of the advantage of having an order for costs made in their favour against the unsuccessful party, which is a feature of arbitrations, even of this character, which are by agreement conducted in this country and which the parties are regarded as having accepted. For the English courts to exercise their undoubted jurisdiction to intervene and order security for costs in this situation avoids the risk of a third party, while financing what could prove to be unfounded litigation, sheltering behind an impoverished party so as to escape what would be otherwise a normal consequence as to costs of being unsuccessful in the arbitration ...

[42] He concluded therefore that this factor in particular, namely the third party financing pointed towards the reality that the appellants if successful might well not recover their costs from the respondents if the arbitrators so ordered. As such on the 'special circumstances' of the case security for costs was justified.

[43] I have expended a considerable portion of this judgment on the foregoing case because it explores comprehensively some of the issues that arise when the courts are asked to provide interim relief in private arbitrations. In the case before this court, although the factual matrix is quite different in relation to the nature of the arbitration and the rules, the reasoning is, with respect, both analytical and helpful.

[44] In the instant case, the arbitration is not a national arbitration involving any foreign parties, as both the plaintiff and defendant are Malaysian companies. Both Malaysian parties agreed, under the MNDA to refer any dispute arising between them to the KLRCA for resolution in accordance with the KLRCA Arbitration Rules. These factual matters immediately distinguish the present case from the *Coppée-Lavalin* case (*supra*).

[45] In fact, as pointed out in that case, the instant case would be akin to the multitude of maritime and commodity arbitrations that have been regularly held in London under standard English forms of contract governed by English law and has a very close connection with the English jurisdiction. In like manner this dispute is one which falls within the purview of the KLRCA under a Malaysian form of contract governed by Malaysian law and having a very close connection with the Malaysian jurisdiction. This is borne out by a consideration of the relevant provisions under both the KLRCA Rules as well as the Arbitration Act 2005.

[46] The relevant provision for interim measures under the KLRCA Rules is r. 26. It makes no express provision for the grant of security for costs. However s. 19 of the Arbitration Act 2005 provides that unless the parties agree otherwise, a party may apply to the arbitral tribunal for, *inter alia*, security for costs. Section 19(2) provides that the arbitral tribunal may require any party to provide appropriate security in connection with such measure as ordered under sub-s. (1).

[47] In the instant case it is not in dispute that Measat wrote to AV Asia seeking to have the arbitral tribunal determine an application for security for costs. AV Asia however did not consent to Measat's proposal. The net effect is that no agreement or consensus could be achieved between the parties for the arbitral tribunal to determine this issue of security for costs. Measat therefore applied to court for this relief.

[48] The jurisdiction of the High Court to so order security for costs is not in issue as such power is expressly provided for in s. 11. It is also pertinent to note that cl. 9 of art. 26 of the KLRCA Rules provides specifically that:

> A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

[49] In these circumstances it is evident that:

(i) The jurisdiction of this court to grant the interim relief of security for costs is express. Such adjudication is not contrary to, but is in fact amenable to the arbitration process because it serves to assist rather than derogate from the arbitral process.

(ii) In an arbitration such as the present case, which is a local arbitration involving local parties who have contracted under Malaysian law, and consented to the arbitral process being conducted under the auspices of the KLRCA and their rules, the grant of such interim relief as security for costs is not governed by any possible policy considerations that may arise in international arbitrations that are governed by, for example the ICC rules, as in the *Coppèe-Lavalin* case (*supra*) where the policy of the English courts was set out, namely that a national court should, as a general rule, decline to make an order for security for costs against a foreign claimant in international arbitrations, unless there are special circumstances which warrant it.

(iii) Unlike the position in the *Coppèe-Lavalin* case (*supra*), there are no such policy considerations that arise in the instant case, which serve to inhibit or restrain the High Court from exercising its discretion in accordance with established legal principles in this jurisdiction, when determining an application for security for costs. As such, it would appear to this court that in arbitration proceedings such as in the present case, the principles embodied in the general body of case law applicable in the adjudication of applications filed in court for security for the costs of court proceedings are equally applicable to applications for security in pending arbitration proceedings.

(iv) To put this another way, a court exercising its discretion as to whether or not to order security for costs in a pending arbitration may look to O. 23 of the Rules of Court 2012 and s. 351 of the Companies Act 1965. This in turn is because the jurisdiction of the court to grant this interim measure is governed by s. 11 of the Arbitration Act 2005 which accords the power to grant such security to the High Court. The

power of the High Court, in turn, to grant this remedy is derived from the Rules of Court 2012 (emanating from the Courts of Judicature Act) and the Companies Act 1965.

[50] Such a conclusion is consonant with the express provisions of the Arbitration Act 2005 as well as the KLRCA Rules as enunciated above. The exercise of such discretion is in accordance with the case law which has been referred to earlier in the judgment.

[51] Having set out the law, I now turn to the application of the same in relation to the facts of the instant case.

The Grounds For The Application For Security For Costs

[52] The plaintiff founds its application for security on the grounds that there is credible evidence to show that AV Asia is not in a financial position to pay Measat's costs of the arbitration in the event that AV Asia is unsuccessful in its counter claim. Such evidence as is relied upon by Measat may be divided into four broad categories as summarised below:

(i) Failure to file annual returns with the Companies Commission of Malaysia since 2002;

(ii) Apparent impecuniosity or insolvency of AV Asia;

(iii) Conduct of AV Asia in refusing, failing or neglecting to pay the security for costs ordered by the courts (at various levels) in respect of the s. 10 and s. 11 applications and appeals, until the issuance by Measat of notices threatening the institution of winding up proceedings;

(iv) Evidence of AV Asia's reliance on third party funding.

[53] Each of these categories will be considered in turn before being considered cumulatively.

(i) Failure To File Annual Returns

[54] It is not in dispute that the defendant has not filed any annual returns with the Companies Commission of Malaysia since the financial year end of 2002. A perusal of the last annual return filed discloses that AV Asia suffered a loss of RM15,446 for the financial year ending 2002. AV Asia has sought to explain this

failure to file its audited returns by stating that it was unable to do so by reason of incidents beyond its control which occurred at the building in which its accounting documents were stored. More particularly, AV Asia states that its building was broken into on or about 2 April 2008. The roof of the building was damaged during the break in, as a consequence of which rain water flowed in through the roof and damaged AV's Asia's documents. To establish the veracity of this incident, AV Asia exhibited both a police report it had lodged in 2008 and an insurance claim it had lodged in the same year in respect of the break in and flooding.

[55] Measat responds to this by pointing out that this incident in 2008 hardly explains the absence of annual returns for the years 2003 to 2007. Moreover no returns were filed after 2008 until the present day. Having considered the affidavits filed in this application as a whole, it appears to this court that AV Asia has failed to give sufficient reasons as to why no returns were filed or reconstructed for a period of some five years since the date of the incident. This is significant, given that the requirement to file returns is a mandatory requirement. Neither has any effort been made to provide any full disclosure in respect of AV Asia's accounting records or financial status.

[56] In summary it would appear that no annual returns were filed for the four years prior to the incident between 2003 and 2007 and after the incident from 2009 to 2013 onwards. It is also pertinent that AV Asia has failed to appraise this court of its financial status despite the several prior applications for security for costs preceding this application at several levels of the court hierarchy.

[57] As such, the logical inferences that can be drawn from the foregoing facts are:

(a) AV Asia has no intention of filing annual returns; and

(b) AV Asia's financial status is dubious. In other words it appears to be impecunious.

(ii) Apparent Impecuniosity Or Insolvency Of AV Asia

[58] A winding up petition was presented against AV Asia and an order for the winding up of the company was made on 10 June 2010 on a petition filed by Public Bank Berhad in respect of a

debt in the sum of RM127,967.62 as at 12 January 2009. AV Asia responds by pointing out that the winding up order was stayed as a consequence of AV Asia and Public Bank Berhad agreeing to a scheduled repayment of the monies due and owing. As a consequence AV Asia maintains that this does not comprise a relevant factor for this application.

[59] It appears to this court that despite the subsequent grant of a stay, the fact of a winding up order having been made in respect of a relatively small debt in 2010, is a relevant factor in assessing AV Asia's ability to pay debts as and when they fall due. The fact that scheduled repayments have to be made in respect of a debt that is relatively small, lends further support to my conclusion in (a) above that AV Asia is not financially stable.

(iii) Conduct Of AV Asia In Refusing, Failing Or Neglecting To Pay The Security For Costs Ordered By The Courts (At Various Levels) In Respect Of The s. 10 And s. 11 Applications And Appeals, Until The Issuance By Measat Of Notices Threatening The Institution Of Winding Up Proceedings

[60] It is not in issue that AV Asia has in fact made full payment to meet all the costs orders made against it. However the payment due under each of these orders was not met until Measat had issued winding up notices in respect of each of the various sets of costs ordered against it. AV Asia seeks to explain this by stating that it had made the necessary payment to its then solicitors who had failed, due to an oversight to make the requisite payment.

[61] While this explanation meets one of the later, if not the last set of costs ordered against it, it fails to explain AV Asia's failure to meet several of the earlier costs orders made against it in 2011 which necessitated the issuance of notices threatening to wind it up on more than one occasion, unless payment was made within a specified time. This again appears to this court to signify an inability to pay relatively nominal sums as and when they fell due.

A **(iv) Evidence Of AV Asia's Reliance On Third Party Funding**

[62] Measat submits that the further evidence of AV Asia having no funds is borne out by the undisputed fact that AV Asia relies
B on third party funding. AV Asia's portion of the advance provisional deposit of USD249,506.88 to the KLRCA was paid by one Chew Weng Kit. AV Asia has responded by stating simply that Chew Weng Kit is the financial consultant of AV Asia.

C **[63]** The judgment of the English House of Lords in *Coppèe-Lavalin SA* (*supra*) is relevant in this respect. I will not reproduce the passages again here. Suffice to state that on the facts of this case it appears that AV Asia will not be able to pay Measat's costs if they lose their counter claim and costs are awarded
D against them in favour of Measat. The third party, Chew Weng Kit, who has assisted by substantially funding AV Asia, will not be legally bound to pay such costs. This means that Measat will be deprived of the advantage of having an order for costs made in its favour against AV Asia, even if it succeeds in its counter
E claim. It is also apparent from the entire factual matrix that Measat has been forced to initiate an arbitration (which is not inexpensive) by AV Asia, which appears to be impecunious, but has been able to fund proceedings thus far with the assistance of a third party. This to my mind, is a significant and relevant factor
F to be taken into consideration in this application.

[64] I am supported in arriving at this conclusion by, *inter alia*, an excerpt from a text, namely *Provisional Measures in International Arbitration* by Gary B. Born (see Chapter 16) where the author states as follows:

G

> Where security for costs may be ordered, tribunals typically consider the financial state of the party from whom security is requested, the extent to which third parties are funding that party's participation in the arbitration (while arguably remaining insulated from a final costs award) and the likely difficulties in
H enforcing a final costs award. Where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong *prima facie* case for security for costs exists. It is doubtful that the likelihood of a party's success on the merits plays a significant
I role in determining whether it is appropriate to order security for costs.

[65] Learned counsel for AV Asia sought to suggest that the *Coppèe-Lavalin* case (*supra*) is distinguishable in relation to third party funding from the present case in that in the *Coppèe-Lavalin* case (*supra*) the Kenyan government as the majority shareholder had utilised the respondent in that case as a shell company or a 'device' to propagate the arbitration. There was no such factual matrix here as Chew is not related to AV Asia as a majority shareholder. I do not however, with respect, concur with learned counsel with regards to such an interpretation of the case. It appears to me that it is sufficient that there is clear evidence of third party financing, which goes to show that the party prosecuting the claim (in the instant case AV Asia prosecuting the counter claim) has insufficient funds to meet a costs order made against it. It does not appear to this court that an applicant need go so far as to establish the subsistence of a 'device' or the use of a 'shell company' in order that it may succeed in an application of this nature.

Should Security For Costs Be Granted?

[66] I have considered in some detail above each of the factors put forward by Measat in favour of its application for security. I have also considered AV Asia's response to each of these contentions. Having analysed and considered their competing contentions, I have concluded that each of the factors enumerated above is relevant for the purposes of determining whether security ought to be granted. (At this juncture I am not concerned with the quantum of security sought, but whether or not security ought, in principle, to be awarded).

[67] It follows that the relevant factors to be considered cumulatively in determining whether or not security for costs of the arbitration ought, in principle, to be granted are:

(i) The failure of AV Asia to file annual returns for a total of not less than ten years (up to 2013). AV Asia's financial status is therefore dubious at best;

(ii) The fact that an order for the winding up of AV Asia was made in June 2010 for a debt of approximately RM127,000 but which order has been stayed pending repayment on a scheduled basis. This comprises clear evidence of the inability

of AV Asia to pay a relatively small debt as and when it fell due both in 2010 and subsequently (given that repayment is staggered);

(iii) The fact that AV Asia was unable to pay relatively small costs orders issued against it over a period ranging from 2011 to 2012 until notices threatening winding up were issued; and

(iv) Undisputed evidence of financing by a third party with no explanation as to why this is necessitated. In this context there is no evidence before this court to allow for the possibility that Measat's costs, if it is successful in defending the counter claim, will in fact be met, should costs be ordered in its favour. On the contrary there is a great likelihood that Measat will have to 'whistle' for its costs, should such an order be made, as the third party is not legally bound to meet any such costs order.

(v) As against this, I am cognisant of the strong underlying principle in such applications, that mere insolvency *per se* is insufficient, in itself, to warrant the grant of security. I remind myself and am mindful that this application ought not to be allowed to stifle or oppress or suppress AV Asia's counter claim which it maintains is genuine and has great merits.

[68] I have given considerable consideration to the foregoing factors. I have also undertaken the task of weighing and balancing the factors favouring the grant of security against those factors justifying the refusal of such security. In considering whether to exercise my discretion to order security for costs, given the risk of stifling what may well be a genuine claim, I have weighed the injustice to AV Asia if prevented from pursuing its counter claim against the injustice to Measat if no security is ordered, and on AV Asia's claim failing, being unable to recover the costs incurred in defending its claim. Having done so, I come to the conclusion that this is a case which justifies the grant of an order of security for costs of the arbitration.

[69] This is not a case in which all that is relied upon is the apparent insolvency or impecuniosity of AV Asia. There is the additional and critical factor of the arbitration being funded by a third party. If AV Asia is unsuccessful in its counter claim it is almost certain that it will not have sufficient means to pay the

costs incurred by Measat. The third party will have no responsibility to meet such costs. This means that Measat will be deprived of the effect of any order of costs being made in its favour against AV Asia. In these circumstances it appears to this court that security ought to be granted and I so conclude.

What Quantum Of Security Ought To Be Granted On The Facts Of The Instant Case?

[70] Section 351(1) of the Companies Act 1965 provides in this context that any order for security should make provision for sufficient security. 'Sufficient security' within the said section has been defined to mean that which is neither illusory nor oppressive. It is also stated that while the court must not allow s. 351(1) to be used as an instrument of oppression, it must equally not allow an impecunious company to put unfair pressure on a prosperous company. (see *Malaysian Civil Procedure 2013* under Order 23 at p. 319).

[71] I have also considered that the court is not required under s. 11 to award security in the sum equal to the anticipated costs or to make no award at all. As stated in *Re Unisoft Group Ltd (No 2)* (*supra*), '...it is not a case of all or nothing. The discretion is wide enough to permit the court to award a sum in between these two extremes if justice and fairness so require. The court has power to order security in the full amount of the anticipated costs. The greater includes the less. The court may order a lesser sum.'

[72] Measat requests for security in the sum of RM4,014,000. In its affidavit in support of the application for security Measat has annexed a skeleton bill of costs making up the total sum of RM4,014,000. Measat contends that the quantum sought is reasonable for the following reasons which I adopt from its submissions:

(i) The allegations made against Measat are numerous and require the perusal of voluminous records and documents on the part of its solicitors;

(ii) The arbitration claim departs from the claim filed in the courts although both are premised on the same factual matrix. Accordingly it is contended by Measat's solicitors that substantial time and effort would be required to conduct the arbitration;

(iii) The issues involved are highly technical and considerable time and effort would be required to study the technical aspects of the case;

(iv) Expert evidence will be called. In the course of oral submissions it was indicated that there would be two experts from Measat's side and one if not two from AV Asia. Time would be required to prepare the expert reports and to prepare for cross-examination;

(v) The arbitration is fixed for a total of ten days;

(vi) Two members of the Arbitral tribunal and the expert witnesses are based abroad and significant expenses will be incurred in relation to their travel, accommodation and fees;

(v) Both Measat and AV Asia have sizeable legal teams comprising five lawyers on each side;

(vi) AV Asia's counter claim is in the sum of RM300 million and therefore the security of RM4 million odd sought is reasonable.

[73] It should also be stated here that learned counsel for Measat sought to introduce in the course of submissions an estimate of the quantum of costs expected to be incurred in relation to the costs of the arbitrators (travel, accommodation and fees) as well as that of the expert witnesses. This was sought to be introduced pursuant to art. 40 read with Appendix D of the KLRCA Rules. However these particulars did not comprise any part of the several affidavits filed by Measat. In these circumstances, learned counsel for AV Asia objected to a consideration of these items in this form, given that these matters had not been deposed to by way of affidavit and as AV Asia had not been accorded an opportunity to respond to the same. I concurred with learned counsel for AV Asia and have therefore not referred to the said estimate in determining a suitable quantum to be ordered by way of security. In this aspect I have been guided completely by the skeleton bill of costs exhibited by Measat in its affidavit in support.

[74] In response to this claim for security in the sum of RM4,104,000, AV Asia maintains firstly that no security at all ought to be granted. This has been dealt with above, and I have determined that security ought to be granted in favour of Measat on the facts of this case.

[75] In relation to the quantum sought, AV Asia submits that the said sum is extortionate and ought to be reduced considerably. In the course of oral submissions learned counsel for AV Asia maintained that if at all security was to be ordered a sum in the region of RM500,000 to RM1,000,000 would be more than reasonable.

[76] AV Asia maintains that:

(i) The sum prayed for by Measat as security is oppressive, excessively exorbitant and made in bad faith;

(ii) It points out that despite a request by it for a general breakdown of the skeleton bill of costs, it received no reply. In fact Measat refused to do so and maintained that the bill of costs was self-explanatory;

(iii) The provision of RM2 million for counsel fees in the bill of costs warrants explanation;

(iv) The failure on the part of Measat to provide explanation or particularisation for seeking a general sum of RM500,000 for 'photocopying, faxing, transport, rental of conference rooms, transcription services with Livenote transcripts and miscellaneous' is clear indication of its inability to justify the quantum sought;

(v) The same counsel who represented Measat in the civil proceedings appear in the arbitration proceedings and therefore does not require the stated time and effort as sought by Measat;

(vi) The question of law or fact involved in the arbitration is whether Measat had breached the MNDA or committed a breach of confidential information under the common law, which comprises a settled area of law that does not require the extensive time and labour held out by Measat's solicitors;

(vii) Almost half of the eleven volumes referred to by Measat as comprising relevant documentation for the arbitration comprises cause papers filed by the respective parties in the civil proceedings.

A (viii) The financial position of AV Asia is caused by the breaches on the part of Measat and its wrongful conduct.

In respect of particular number (viiii) however, there was no evidential basis put forward by AV Asia to substantiate the same.

B

(ix) AV Asia's share of arbitrators' fees and administration costs has been paid in full.

(x) In summary, the sum of RM4,014,000 if granted would be punitive in nature.

C

[77] In determining the requisite quantum of security to be granted I have given consideration to the skeleton bill of costs and assessed the same with a view to trying to estimate the sort of costs that might be incurred should the arbitration run its full course. (see *Re Unisoft Group Ltd (No 2)* [1993] BCLC 532). It must be said that the court's task would have been considerably easier if more relevant particulars had been included. In an application of this nature it is prudent to provide detailed estimates of time costs both in respect of time expanded by counsel as well as the rates imposed. In short there should be a thorough breakdown of cost provided.

D

E

I have undertaken the exercise of going through each and every particular from items 1-32 in the skeleton bill and determined whether the sum specified therein is reasonable. I do not propose to go through each particular in the course of this judgment, as this is not a taxation exercise. However as this was the only document that supported the claim for security in the sum of RM4,014,000, it was necessary to scrutinise the same with care and assess whether the sum claimed was reasonable in all the circumstances of the case within the knowledge and experience of this court.

F

G

[78] Having done so I concluded that the sums sought were to a considerable extent relatively high. I therefore scaled down the said sums as follows:

H

I

	SKELETON BILL OF COSTS		
No.	**Particulars**	**Costs sought by the Plaintiff (RM)**	**Costs Awarded (RM)**
1.	Drafting, issuing and service of the notice to arbitrate and its annexures thereto, and submitting a written request to the Director of the KLRCA to refer the dispute to arbitration.	35,000	12,000
2.	Considering selection of arbitrator and liaising with and appointing Rt. Hon. Professor Sir Robin Jacob as the claimant's party-appointed arbitrator	5,000	3,000
3.	Perusing and considering the respondent's response to the notice of arbitration dated 21 November 2012	8,000	4,000
4.	Responding to the respondent's objections with regards to the composition of the arbitral tribunal	8,000	4,000
5.	Preliminary issue on the number of arbitrators – Perusing the respondent's outline submission (on the preliminary issue) filed on 29 April 1203 and authorities. – Drafting and preparing the claimant's submission in answer dated 14 May 2013 (in respect of the preliminary question on the number of arbitrators) together with the annexures to the claimant's submission and authorities. – Perusing the respondent's outline submission in reply dated 19 May 2013. – Perusing the arbitral tribunal's decision dated 20 May 2013.	65,000	20,000

No.	Particulars	Costs sought by the Plaintiff (RM)	Costs Awarded (RM)
6.	Perusing and considering the arbitral tribunal's Template Procedural Order No. 1, liaising with the respondent's solicitors on the same and agreeing on the provisional timetable found in the annex to the Template Procedural Order No. 1	8,000	4,000
7.	Drawing, issuing, filing and service of the claimant's statement of claim dated 5 August 2013	55,000	35,000
8.	Perusing and considering the respondent's defence and counter claim dated 9 September 2013	35,000	15,000
9.	Drawing, issuing, filing and service of the claimant's reply and defence to counter claim	40,000	20,000
10.	Perusing the respondent's reply to defence to counter claim	35,000	10,000
11.	Drawing, filing and service of the claimant's application for security for costs, Skeleton bill of costs, written submissions and attending to hearing of this application	55,000	35,000
12.	Drawing, filing and service of the claimant's list of documents and copies of the claimant's documents contained in said list	80,000	35,000
13.	Perusing the respondent's list of documents and copies of the respondent's documents contained in said list	65,000	20,000
14.	Preparing for and attending the telephone case management conference on 5 December 2013	5,000	2,000

No.	Particulars	Costs sought by the Plaintiff (RM)	Costs Awarded (RM)
15.	Attending further pre-hearing conferences	15,000	15,000
16.	Drawing, filing and service of any interlocutory applications, and attending hearing of the same; responding to any interlocutory applications filed by the respondent and attending hearing of the same	55,000 (per application)	0
17.	Drawing and issuing subpoenas	10,000	2,000
18.	Interviewing and corresponding with witnesses and potential witnesses, and preparing witness statements	120,000	50,000
19.	Arranging to obtain report from expert and perusing the expert report	40,000	40,000
20.	Perusing and considering the respondent's witness statements and expert report	85,000	40,000
21.	Taking instructions from client; attending on and corresponding with client	45,000	40,000
22.	Considering the facts and law	50,000	25,000
23.	Briefing and instructing counsel	85,000	50,000
24.	Liaising with the KLRCA with regards to deposits to be paid and other administrative matters	45,000	30,000
25.	Research in law	150,000	90,000
26.	Attendance at the hearing	100,000	100,000
27.	Drawing, filing and service of the claimant's opening statement, written closing submission on liability and written closing submission on costs	85,000	85,000

No.	Particulars	Costs sought by the Plaintiff (RM)	Costs Awarded (RM)
28.	Perusing the respondent's opening statement and written closing submissions	65,000	65,000
29.	Preparation and attendance at oral closing submissions	30,000	30,000
30.	Counsel fees	2,000,000	250,000
31.	General care and conduct of the proceedings	35,000	10,000
32.	Disbursements – Photocopying – Facsimile/Telephone – Transport – Rental of conference rooms at the KLRCA for hearing – Transcription services with livenote transcripts – Miscellaneous	500,000	500,000
	TOTAL	**4,014,000**	**1,191,000**

[79] I therefore conclude that realistically, Measat's security for costs on the basis of a reasonable assessment of its skeleton bill of costs ought to be in the region of RM1,191,000. I am aware that I have been stringent and rigorous in the assessment exercise I have undertaken. However I am satisfied that the quantum of security ordered should be considerably less than RM4,014,000 as this sum is excessive. Moreover, this claim for security ought not to stifle or oppress or suppress AV Asia's claim. On the other hand Measat ought not to be out of pocket substantially in defending the counterclaim brought by AV Asia. Therefore taking all factors cumulatively into account it appears to this court that the justice and fairness of this case requires that the quantum of security for costs to be furnished by AV Asia is the sum of RM1,191,000, and I so order. It is further ordered that the said sum be paid into court within three months of the date of this order ie, on or by 15 April 2014. In the event such security is

not furnished within the specified time frame it is ordered that the defendant's counter claim in the arbitration be stayed. The costs of this application have been provided for in the security ordered above and therefore no further order in respect of the costs of this application is made.

A

B

C

D

E

F

G

H

I